IN THE SUPREME COURT OF THE UNITED STATES

No. 17-961

THEODORE H. FRANK, *et al.*,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' JOINT MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, respondent Paloma Gaos, individually and on behalf of all others similarly situated (the "class respondents"), and respondent Google LLC respectfully move for divided argument in this case. Respondents propose that, of the total argument time allotted to respondents, approximately half be allotted to class respondents and half be allotted to respondent Google. As a result, granting this motion will not require the Court to enlarge the total amount of time for argument. All parties consent.

This case concerns the circumstances in which Federal Rule of Civil Procedure 23 permits "*cy pres*" distributions of class-action settlement proceeds—*i.e.*, distributions of settlement funds to third parties to perform work that benefits class members. Gaos

brought a putative class action against Google, alleging that Google's disclosure of users' search terms to third parties through HTML "referrer headers," without user consent, violated the Stored Communications Act, 18 U.S.C. §§2701, *et seq.* After years of litigation and extensive negotiations, the parties entered a settlement agreement. Under that agreement, Google was obligated to make new disclosures to inform users of Google's referrer-header practices to ensure that such data was shared with user consent.

Google also agreed to pay $8.5 million. The class, however, was extraordinarily large—estimated at over 100 million persons—compared to the settlement amount. The district court found that distribution of funds to class members was not feasible, as administration and distribution costs would dwarf any sums distributed. The parties agreed that the funds would be distributed to six organizations working in the field of internet privacy that could use the money to remedy the types of practices that prompted the lawsuit. Five class members, including the petitioners here, objected to the settlement; the petitioners did not object to the amount of the settlement, but only to its distribution. After a hearing, the district court certified a settlement class under Rule 23(b)(3), and found that the settlement was "fair, reasonable, and adequate" for purposes of Rule 23(e). The court of appeals affirmed. This Court granted certiorari to review that decision.

Respondents believe that the Court would best be assisted by hearing from both respondents—the plaintiff class and the defendant Google—at oral argument. The plaintiff class and defendant Google do share an interest in defending the settlement they agreed to below. But they are opposing parties in this litigation. They are represented by separate counsel; Jeffrey Lamken of MoloLamken LLP would argue for the class re-

spondents, while Donald Falk of Mayer Brown LLP would argue for Google. And, importantly, they have different—and in some instances opposing—perspectives and interests.

For example, Google is almost always a defendant in class-action litigation; its position reflects defense perspectives. See, *e.g.*, Google Br. 31 (emphasizing the utility of *cy pres* settlements because they allow defendants to efficiently dispose of certain cases). By contrast, the class brings a plaintiff's perspective. See, *e.g.*, Class Br. 26 (emphasizing benefits to plaintiff class compared to alternatives, as well as value of deterring misconduct). Similarly, Google is better positioned to address some of petitioners' contentions (*e.g.*, that defendants use *cy pres* to "benefit themselves," Pet. Br. 30-33), while other contentions are more appropriately addressed by the class respondents (*e.g.*, that "class counsel" use *cy pres* "to self-deal at the expense of their clients," *id.* at 20-21); compare also *id.* at 32-33 (challenging Google's connection to *cy pres* recipients), with *id.* at 54-56 (challenging class counsel's connections to *cy pres* recipients).

Most important, the interests of the plaintiff class and defendant Google appear to diverge dramatically on some issues. Attorney's fees is one example. Contrast Google Br. 55 (suggesting Court can address attorney's fee issues and could remand the fee award for reduction), with Class Br. 40 (urging that fee issues were waived below and are beyond the question presented). Critically, their positions on class-member standing, an issue raised by the United States (U.S. Br. 13-15), are divergent as well. Google deems the class members' standing "doubtful at best," but states that its "obligation to support the settlement constrains [its] ability to discuss this matter further." Google Br. 46. The

class respondents, by contrast, are prepared to defend class members' standing as necessary. Class Br. 54-56. Divided argument will allow the Court to explore these and other issues with counsel for the party best positioned to address them, while also affording the Court the differing perspectives that plaintiffs and defendants offer.

Accordingly, respondents respectfully request that the motion for divided argument be granted. This Court has granted similar motions in the past. See, *e.g.*, *Adoptive Couple* v. *Baby Girl*, 569 U.S. 902 (2013); *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-1293.htm (Order dated Nov. 22, 2011); *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 558 U.S. 1010 (2009). If the Solicitor General is granted 5 minutes of respondents' argument time, respondents propose dividing the remaining 25 minutes so that 13 minutes are allocated to Mr. Lamken as counsel for the plaintiff class, and 12 minutes are allocated to Mr. Falk as counsel for defendant Google (or any other allocation of time the Court deems appropriate). Otherwise, they propose dividing the time for respondents evenly. Petitioners have consented to this motion. The United States, amicus curiae, has no objection either.

Respectfully submitted.

/s/ Donald M. Falk
DONALD M. FALK
Counsel of Record
EDWARD D. JOHNSON
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

DANIEL E. JONES
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006

RANDALL W. EDWARDS
O'MELVENY & MYERS LLP
Two Embarcadero
Center, 28th Floor
San Francisco, CA 94111

Counsel for Respondent
Google LLC

/s/ Jeffrey A. Lamken
JEFFREY A. LAMKEN
MICHAEL G. PATTILLO, JR.
JAMES A. BARTA
WILLIAM J. COOPER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

/s/ Kassra P. Nassiri
KASSRA P. NASSIRI
NASSIRI & JUNG LLP
Counsel of Record
47 Kearny Street
Suite 700
San Francisco, CA 94108
(415) 762-3100
kass@njfirm.com

MICHAEL ASCHENBRENER
KAMBERLAW, LLC
201 Milwaukee Street
Suite 200
Denver, CO 80206
(212) 920-3072

JUSTIN B. WEINER
JORDAN A. RICE
MOLOLAMKEN LLP
300 N. LaSalle Street
Chicago, IL 60654
(312) 450-6700

Counsel for Class Respondents

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